

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DARRELL COURTNEY,) No. C 08-1791 JSW (PR)
Plaintiff,)
v.) **ORDER OF DISMISSAL**
R. MOUSER,)
Defendant.)

Plaintiff, a California prisoner, filed this pro se civil rights action under 42 U.S.C. § 1983, and thereafter filed an amended complaint.¹ In the amended complaint he states that he has not exhausted all of his administrative remedies, and that his administrative appeal is “pending” at the “second level” of review. (Amended Complaint at 2.).

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See id.* at § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

¹The amended complaint supersedes the original complaint. See *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)

1 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321
2 (1996) (“PLRA”) provides: “No action shall be brought with respect to prison conditions
3 under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail,
4 prison, or other correctional facility until such administrative remedies as are available
5 are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and not left to the
6 discretion of the district court. *Woodford v. Ngo*, 126 S. Ct. 2378, 2382 (2006).
7 Exhaustion is a prerequisite to all prisoner lawsuits concerning prison life, whether such
8 actions involve general conditions or particular episodes, whether they allege excessive
9 force or some other wrong, and even if they seek relief not available in grievance
10 proceedings, such as money damages. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The
11 exhaustion requirement requires “proper exhaustion” of all available administrative
12 remedies. *Woodford*, 126 S. Ct. at 2387.

13 The State of California provides its prisoners and parolees the right to appeal
14 administratively “any departmental decision, action, condition or policy perceived by
15 those individuals as adversely affecting their welfare.” Cal. Code Regs. tit. 15,
16 § 3084.1(a). In order to exhaust available administrative remedies within this system, a
17 prisoner must proceed through several levels of appeal: (1) informal review, (2) first
18 formal written appeal on a CDC 602 inmate appeal form, (3) second formal level appeal
19 to the institution head or designee, and (4) third formal level appeal to the Director of the
20 California Department of Corrections and Rehabilitation. *See Barry v Ratelle*, 985 F.
21 Supp 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A final
22 decision from the Director’s level of review satisfies the exhaustion requirement under §
23 1997e(a). *See id.* at 1237-38.

24 Because exhaustion under § 1997e(a) is an affirmative defense, a complaint may
25 be dismissed for failure to exhaust only if failure to exhaust is obvious from the face of
26 the complaint and/or any attached exhibits. *See Wyatt v. Terhune*, 315 F.3d 1108,

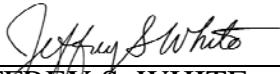
1 1119-20 (9th Cir. 2003). The court may dismiss a complaint for failure to exhaust where
2 the prisoner “conce[des] to nonexhaustion” and “no exception to exhaustion applies.” *Id.*
3 at 1120. Here, Plaintiff concedes in his amended complaint that he has not exhausted his
4 administrative remedies (Amended Complaint at 2), and no exception to exhaustion is
5 alleged or apparent in the amended complaint. Section 1997e(a) requires that Plaintiff
6 present his claim to each level of administrative review set forth above, including the
7 Director’s level of review, before raising the claim in a § 1983 complaint in federal
8 court. An action must be dismissed unless the prisoner exhausted his available
9 administrative remedies before he or she filed suit, even if the prisoner fully exhausts
10 while the suit is pending. *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002). As
11 it is clear from the complaint that Plaintiff has not pursued all levels of administrative
12 review available to him, and there is no applicable exception to the exhaustion
13 requirement, dismissal without prejudice is appropriate.

14 Accordingly, the above-titled action is hereby DISMISSED, without prejudice to
15 Plaintiff’s refiling his claim after all available administrative remedies have been
16 exhausted.

17 The Clerk shall close the file and enter judgment in favor of Defendants.

18 IT IS SO ORDERED.

19 DATED: May 30, 2008

20 
21 JEFFREY S. WHITE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

DARRELL COURTNEY,

Case Number: CV08-01791 JSW

Plaintiff,

CERTIFICATE OF SERVICE

V.

RICHER MOSER et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 30, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Darrell Courtney J94495
P.O. Box 290066
Represa, CA 95671

Dated: May 30, 2008

Jennifer Ottolini
Richard W. Wierking, Clerk
By: Jennifer Ottolini, Deputy Clerk

28